CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
February 2015 (2)

Class Actions Against Infringements of EU Competition Law: A One-Way Road Towards Effective Private Enforcement

Lia Vitzilaiou (Lambadarios Law Firm)
&
George Zohios (Alexiou & Kosmopoulos Law Firm)

www.competitionpolicyinternational.com

Class Actions Against Infringements of EU Competition Law: A One-Way Road Towards Effective Private Enforcement?

Lia Vitzilaiou & George Zohios[1]

I. INTRODUCTION

Class actions are a controversial issue, since they have attracted both criticism and praise. It is fair to say that so far there is no consensus among academics or practitioners about the virtue or vice of class actions, as there are plausible arguments for both.

The U.S. jurisdiction has probably contributed more than most in the development of class actions and the emergence of the relevant debate. On the contrary, the European Union appears more hesitant and reluctant to adopt class actions at a Community level, while at a national level, there is much diversity among Member States about the mechanisms of collective redress and the adoption of class actions *per se*.

With the issuance of the EU Directive on Damages for competition law infringements last November, and the upcoming entry into force of the Commission Recommendation on Collective Redress this July, the issue of class actions has come once again to the fore, especially with regard to competition law infringements. Whether or not class actions can be the most effective instrument for antitrust damages at an EU level is a question that has concerned lawmakers for a long time and which so far has been responded rather to the negative. However, there is still margin for revisiting this position, especially after the evaluation of the collective redress mechanisms recommended by the EU Commission, which is expected to take place in 2017.

This article examines class actions as a form of collective redress from a competition law viewpoint; inevitably, however, many of the remarks concern class actions and collective redress mechanisms in general. First, the nature of class actions and their difference from other forms of group litigation are briefly presented; then, the main advantages and disadvantages of class actions are discussed; third, the position of the EU Directive on Antitrust Damages vis-à-vis class actions and that of the Commission Recommendation on Collective Redress are summarized; and, finally, class actions and other forms of collective redress are examined with regard to Greek competition and consumer protection law.

II. CLASS ACTIONS VS SIMILAR FORMS OF GROUP LITIGATION

A class action is a type of lawsuit where one party or a group of parties with common interests on a particular issue sue (or are sued by) another party, both on their own behalf and on behalf of others who are similarly situated but have not brought a claim.

[1] Senior Associates at Lambadarios Law Firm and Alexiou & Kosmopoulos Law Firm, respectively.

Class actions normally concern a group of unidentified claimants/defendants (i.e. a "class" of individuals) who are in principle bound by the *res judicata* of the relevant judgment, even if they do not participate in the process.

The prerequisites for bringing a class action vary among different jurisdictions, but generally it is necessary that the issues in dispute are common to all members of the class and that the persons affected are so numerous as to make it impracticable to bring every person before the court.

Class actions must be distinguished from other forms of group litigation, such as joinder of claims (or parties), collective claims, and representative actions. In brief:

Joinder of claims (or parties) is a group of claims brought together by different claimants (or joined by the judge) due to the essential similarity in their factual and legal basis. Technically, only one judgment is issued; however, the individual claims are evaluated separately and the eventual awards of damages are separately made to each claimant. Understandably, the *res judicata* concerns only the particular claimants.

A **collective claim** is a single claim brought on behalf of a group, whose members are identified, or at least identifiable. The *res judicata* as well as the eventual award of damages concerns the group as a whole.

A **representative action** is an action brought by a body on behalf of identified individuals, which normally belong to that body (e.g. members of an association). The *res judicata* and the eventual award of damages concern each individual separately.

III. ADVANTAGES AND DISADVANTAGES OF CLASS ACTIONS

This section provides a brief presentation of the most commonly cited advantages and disadvantages of class actions. As the European Union does not essentially have a tradition in class actions, or at least a uniform one, the debate on class actions and the relevant arguments in favor or against them have been mainly expressed with regard to the U.S.-style class actions.

A. Advantages of Class Actions

Despite the debate about the disadvantages of class actions and the possible solutions to address them, there is generally consensus about their benefits, most of which also apply to other forms of group litigation (e.g. joinder of claims, representative actions, collective claims, etc.). Their main advantages may be summarized as follows:

1. Lower Litigation Costs

The process of building an effective case for infringements pertaining to certain areas of law, such as competition law, consumer protection law, or environmental protection law may prove difficult, costly and time-consuming, while the litigation procedure *per se* may also prove lengthy and expensive. In fact, in individual antitrust cases, the costs of litigation such as lawyers' fees, expenses associated with bringing the case to court, potential settlement costs, and enforcement costs usually prove too high for individual claimants.

This parameter, in combination with the asymmetries between individual claimants on the one hand, and powerful defendants on the other, regarding their financial resources and their ability to invest in litigation, constitute disincentives for consumers and discourage them from

filing an action with the court, even if they have suffered harm as a result of competition law infringements.

Class actions can provide a solution to this economic obstacle by gathering many individual claims together into a single action with distributed litigation costs. In essence, the overall burden of litigation costs is effectively reduced as the plethora of class members in the claimant group provides a shared expense benefit to each individual class member.

Furthermore, class actions may induce a greater number of settlements, which is a cheaper way of dispute resolution than the litigation process. In fact, it has been proven in practice that one of the main motivations to settle is the associated saving of litigation costs, in combination with the lower procedural requirements of out-of-court settlement procedures. In addition, a settlement usually proves less time consuming than a full trial procedure, since not all the merits of individual cases need to be evaluated and decided upon.

The above are largely supported by empirical evidence such as the study conducted by Eisenberg & Miller, who analyzed a set of settled U.S. class actions and confirmed that individual costs of litigation and counseling decrease in proportion to the increase in the number of participants in the group.[2]

2. Stronger Position of Claimants

One of the main benefits of class actions is that they are designed to provide access to justice also for claims that are too small to make economic sense to pursue individually. The representation of similar claimants organized in a large group generally operates favorably for establishing the validity of a claim and strengthens the claimants' negotiating position, thus leading to more out-of-court settlements. In this regard, a class action may prove to be the only means of judicial relief for certain individuals, especially for those with small claims involving complex issues, which would be too expensive to litigate.

Also, in an individual action before courts, the claimant may find himself at a great disadvantage against a well-financed corporate opponent. On the contrary, with the mechanism of class actions the claimants have the opportunity to be represented by experienced and otherwise unaffordable legal counsels, since class actions normally provide an incentive to lawyers to bring private enforcement actions. Not unusually, law firms that assume such high profile cases cover their own fees and the costs associated with hiring experts for an agreed contingency fee, which gives claimants the opportunity of a comprehensive and efficient legal representation. Although the damages for one or a few individuals may be too small to make a lawsuit "profitable," a class action can aggregate many claims so that there is a significant total amount at stake—enough to attract an expensive, experienced, and expert group of counsels to handle the case.

3. Judicial Efficiency—Uniformity

One of the main disadvantages of individual litigation is that, whenever several claimants bring separate actions that involve a common question of law or fact against the same defendant,

[2] T. Eisenberg & G.P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1(1) J. EMPIRICAL LEGAL STUDIES, 27 (2004).

there is a serious risk of duplicative liability and different substantive outcomes, resulting in legal uncertainty.

On the contrary, class actions may increase administrative efficiency by reducing the risk of inconsistent judgments and the legal uncertainty as a result thereof. Thus, class actions can contribute to the formation of an enhanced and uniform legal framework, by converging claims of multiple claimants into a single action against a common violation, for which a single judgment is issued.

The consolidation of numerous individual claims in a centralized procedure can also result in economies of scale and reduced costs for the administers, who would otherwise bear more expenses and dedicate more resources if multiple separate actions were to be tried for the same violation. By combining all claims based upon the same set of facts into one action, a class action relieves the courts from hearing a multiplicity of actions and also the defendants from the expenses and time of presenting the same evidence and experts multiple times in successive suits.[3]

4. Deterrence

Deterrence is one of the primary purposes of private enforcement in competition law. Unlike other fields of law where the deterrent value of private enforcement has been questioned, the deterrent effect of private enforcement in competition law is widely acknowledged.

Such deterrent effect is best assessed based on the *ex ante* perspective of the would-be infringer, in the sense that a potential infringer normally engages in a cost-benefit analysis before deciding whether or not to break the law. If the costs exceed the benefits, the potential infringer will refrain from illegal activity. In this respect, effective deterrence requires that the infringer compares the potential penalty with the expected benefit of engaging in illegal conduct.

Class actions, as a mechanism of private enforcement for competition law infringements, are widely believed to bring significant results in terms of deterrence. On the one hand, the mechanism of class actions gives the opportunity to many claimants who would not have otherwise filed an action against the infringer, to now do so. On the other, the risk of being attacked by a class action, which may result in both compensatory and punitive damages and entail high legal costs, constitutes an important incentive for undertakings to voluntarily comply with the law.

This deterrent effect of class actions is also supported by empirical data from the United States.[4] A study analyzing the impact, in terms of deterrence, of 40 successful antitrust class actions in the United States confirmed that, indeed, class actions have significant deterrent power. The study found that the amount recovered in private cases is substantially higher than the total of the criminal antitrust fines imposed during the same period. Additionally, almost half of the underlying violations were first uncovered by private attorneys, rebutting criticisms that

[3] For further information, *see* REPORT FOR THE EUROPEAN COMMISSION, DG COMP/2006/A3/012, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios," *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf.

[4] Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 906 (2008).

private actions have limited deterrent value because they most commonly "follow-on" public enforcement.

B. Disadvantages of Class Actions

Although class actions can generate benefits in various aspects, they have been also criticized for having serious disadvantages. The most commonly cited disadvantages are the principal-agent problems and the risk of frivolous suits.

1. Principal-Agent Problems

A major cause for criticism with regard to class actions concerns the so-called principal-agent problem, which is mainly associated with:

a) the structure of the class action mechanism, which attributes decision-making power to settle and take other important decisions regarding the action only to the class lawyers; and
b) the misalignment of interests between the lawyers and the represented class.

The class' interest is to maximize recovery and minimize litigation expenses and lawyers' fees. On the contrary, the interest of the class lawyers is to maximize their fees. In this context, especially when lawyers are remunerated with contingency fees, they may choose to put less effort in litigation and settle sooner and also for lower amounts—even when such an option would not be to the interest of the class—in order to avoid potential defeat in court and lose the contingency fee.

2. Frivolous Suits

Criticism against class actions also focuses on the risk of frivolous litigation, namely when claimants presume that their case is meritless and expect to lose in court, but file a class action anyway with the expectation that the defendant will settle the case.

The problem of excessive litigation has been a major cause for concern in debates over private enforcement reforms over the last years. Critics of the class action mechanism consider it accountable for enabling large numbers of lawsuits of dubious merit, which often result in unfair and abusive settlements.

Indeed, class actions may be used as a tool of pressure against potential defendants. Many defendants, who may be unwilling to assume litigation costs or cannot afford to take the risk of a trial, choose to settle by paying a certain amount to the class and the lawyers. It has been observed that claimants often file frivolous class actions because they know that defending the action costs more and is riskier than settling it. The pressure on defendants to settle even unfounded claims gives claimants substantial leverage—so much so that some courts and commentators have characterized class actions as "blackmail" in essence.[5]

[5] Randy Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment* (Harvard Public Law Working Paper No. 90, 2004).

IV. CLASS ACTIONS IN EU COMPETITION LAW

A. The EU Directive on Damages

In November 2014, after 12 years of preparatory works, the European Commission published its Directive on Damages for competition law infringements[6] ("the Damages Directive").

Despite lengthy discussions and relevant proposals during the consultation procedure, in the end the Damages Directive did not provide for class actions, or for any form of collective redress, depicting the prevalent concern of the EU legislator for the potential of abusive litigation associated with U.S.-style class actions (see above under III.B.2).

In essence, the Damages Directive leaves it to Member States to decide whether to introduce the option of collective redress within the frames of private enforcement of competition law. This choice of the EU legislator has been widely criticized, especially by practitioners who argue that a binding approach on collective redress would be a significant step towards effective consumer protection and antitrust enforcement.

B. Commission Recommendation on Collective Redress

The aforementioned reluctance to introduce class actions as a means of private enforcement for competition law infringements was partly balanced by the issuance of the Commission Recommendation on Collective Redress mechanisms[7] ("the Recommendation").

The Recommendation adopts a horizontal approach to collective redress and is thus applicable in diverse areas where EU Law grants rights to natural and/or legal persons (e.g. consumer protection, environmental protection, data protection, etc.), including, therefore, competition law. Consequently, group litigation for violations of EU competition law will in principle be available to consumers, albeit not in a sufficiently uniform manner among Member States and not in the form of U.S.-style class actions.

In the words of the EU Commission:

> "Collective redress" is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices that affect a multitude of claimants or the compensation for the harm caused by such practices. (…) Collective redress procedures can take a variety of forms, including

[6] Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD/2013/0204 final, *available at*: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013SC0204

[7] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:201:0060:0065:EN:PDF

> out-of-court mechanisms for dispute resolution or, the entrustment of public or other representative entities with the enforcement of collective claims.[8]

Essentially, by the procedural mechanism of collective redress, multiple single claims that concern the same case are brought by a single action, primarily aiming at procedural economy, lower litigation costs, and efficiency of enforcement.

A basic difference between the collective redress introduced by the Recommendation and U.S.-style class actions is that, in the former case, the claimants are specific persons who actively decide to join (or not) the action of the group, while in the case of U.S.-style class actions the group is determined *ex ante* and the persons belonging thereto automatically participate in the action, unless they opt out. Also, under the scheme proposed by the Recommendation, neither punitive damages nor contingency fees are allowed, unlike U.S. class actions.

The Recommendation requires Member States to introduce mechanisms that will allow collective actions against EU Law infringements when they affect rights granted to natural or legal persons. At the same time, it provides procedural safeguards to deviate from the U.S.-style class actions and ensure that abusive litigation is avoided.

Furthermore, the Recommendation provides a set of common principles in order to: (i) ensure a coherent approach to collective redress in Member States, (ii) improve the enforcement of rights granted under EU Law, and (iii) facilitate access to justice for persons who would otherwise be reluctant or deterred to do so (e.g. due to the associated costs, etc.).

The course of collective redress is expected to operate complementarily to public enforcement proceedings, which already operate in certain areas of law such as competition law. However, in such fields of law, where public enforcement is considered effective, the Recommendation indicates that collective actions should in principle be taken once the competent public authority has found an infringement.

The main principles set out by the Recommendations are:

- Collective redress mechanisms should allow both injunctive relief (actions seeking to put an end to the illegal behavior) and compensatory relief (actions seeking the adjudication of damages for the harm caused);[9]
- Representative entities should be officially certified and non-profit; they must have sufficient financial, legal, and human resources; and their objectives should have a direct relationship with the rights claimed to have been infringed;[10]
- Legal costs of the winner are paid by the losing party ("loser pays principle");[11]

[8] COMMISSION STAFF WORKING DOCUMENT PUBLIC CONSULTATION: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, ¶ 7, *available at*: http://ec.europa.eu/dgs/health_food-safety/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf

[9] *See* Article 2 of the Recommendation.

[10] *See* Articles 4-7 of the Recommendation.

[11] *See* Article 13 of the Recommendation.

- Collective redress should in principle operate at an opt-in basis (as opposed to opt-out, which should only exceptionally be allowed), in the sense that the claimants should actively decide to join the represented group in the action;[12]
- Alternative dispute resolution should be encouraged;[13]
- Contingency fees should be prohibited and unnecessary incentives to litigation should be prevented in order to avoid abusive litigation;[14] and
- Punitive damages should not be allowed, since this potential increases the economic interests at stake and thus the risk for abuse of the collective redress system.[15]

Albeit non-binding, the EU Commission invited Member States to implement the Recommendation by July 26, 2015 and, accordingly, to submit annual reports about the operation of the collective redress mechanisms recommended. Respectively, the Commission shall assess the implementation of the Recommendation by July 2017, evaluate its impact, and respectively decide as to whether additional measures should be adopted in order to strengthen the horizontal approach of collective redress.

V. CLASS ACTIONS IN GREEK LAW?

In principle class actions are neither provided for nor permitted in Greek Law.

The prohibition of class actions derives from Art. 68 Code of Civil Procedure ("CCP"), which provides that a person is entitled to judicial protection only if that person has *direct* legal interest. Consequently, in order for a class action to be permitted—namely for the requirement of direct legal interest to be circumvented—there must be a specific legal provision which establishes an exception to the general prohibitive rule of Art. 68 CCP.

A. Representative Collective Actions for Violations of Consumer Protection Law

An exceptional rule to Art. 68 CCP is essentially introduced by Article 10 para. 1 of Law 2251/1994 on consumer protection, which provides that consumer unions aiming at protecting the rights and interests of consumers are entitled to represent consumers judicially and file representative collective actions.

In particular, para. 16 of Article 10 L. 2251/1994 provides that a consumer union of at least 500 members, which has been duly registered in the Registry of Consumer Unions for at least one year, may file an action of any kind for the protection of the general interests of consumers (representative collective action), provided that the illegal behavior in question infringes the rights of at least thirty consumers without distinguishing between members and non-members.

The protection sought by this collective action concerns an indefinite number of persons (consumers) with the same legal interests and may consist in both injunctive and compensatory

[12] *See* Articles 21-14 of the Recommendation.
[13] *See* Articles 25-28 of the Recommendation.
[14] *See* Articles 29-30 of the Recommendation.
[15] *See* Article 31 of the Recommendation.

relief, as well as declaratory relief (i.e. declaration of indemnity rights for consumers). These collective actions must be brought within six months as from the date of the last manifestation of the infringement, before the courts of the defendant's seat.[16]

The legal effects of the judgment issued following an action requesting injunctive and/or compensatory relief are valid and binding *vis-à-vis* everyone, even if they were not part of the dispute. Similarly, the *res judicata* effect of a collective action requesting the declaration of a right to indemnity is valid for all consumers damaged by the behavior in question, even if they did not participate in the relevant litigation.

When the judgment declaring the right to indemnity becomes final, any consumer may seek the payment of indemnity from the defendant and may even have a payment order issued against the latter.[17]

Finally, the chambers of commerce and industry and/or professional and artisanal chambers may also file a collective action by analogous application of the aforementioned provisions.[18]

B. Collective Actions for Competition Law Infringements?

Greek Law 3959/2011 on the protection of competition does not contain a provision similar to that of L. 2251/1994.

Hence, due to the general prohibition of Art. 68 CCP, in principle no class action or representative collective action is permitted for competition law violations. On the contrary, injured parties (consumers) should file individual claims on the basis of Article 914 Civil Code, which establishes tort liability, in conjunction with Article 35 para. 2 of Law 3959/2011, which establishes the competence of civil courts to hear such disputes, pursuant to Article 6 EU Council Regulation 1/2003.

However, albeit not a class action or representative collective action *per se*, there is a possibility that more than one person may file a claim for damages for competition law infringements:

a) Article 74 CCP provides that an action may be jointly brought by more than one party (and, respectively, against more than one party) if: i) the claimants have a common right, or their rights are based on the same legal and factual basis; or ii) the object of the dispute consists of similar claims which are based on a similar factual and legal basis (joinder of claims/parties); and

b) Article 62 CCP provides that unions of persons pursuing a cause, even without legal personality, are entitled to be litigants. Consequently, such unions may file an action for tort under Art. 914 Civil Code, when an infringement of competition law has occurred, provided that they have suffered direct damage (and thus have direct legal interest) as a result thereof.

[16] ¶¶18 & 19 Art. 10 L. 2254/1994.
[17] ¶20 Art. 10 L. 2254/1994.
[18] ¶20 Art. 10 L. 2254/1994.

VI. EPILOGUE

Decades after their introduction, class actions still remain a subject of much debate, especially in view of the current tendency to encourage private enforcement in certain areas of law of core importance, such as competition law. Significant advantages and equally important disadvantages have been associated with the culture of class actions, while no consensus has been reached about their virtue or vice.

So far the European Union has refrained from the adoption of class actions for competition law infringements; instead, it promotes more subtle mechanisms of collective redress and does so in a non-binding way. It remains to be seen whether the collective redress mechanisms recommended by the Commission in combination with the regime laid out by the Damages Directive, which seeks to encourage private enforcement of EU competition, reach their goals and succeed in facilitating access to justice for EU citizens, or whether additional legal reforms are required to adopt more effective means of private enforcement, such as, eventually, the introduction of a uniform EU class action system.